Supreme Court, U.S.
FILED
MAR 28 1994
THE CLERK

No. 93-1296

In the Supreme Court of the United States

OCTOBER TERM, 1993

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

SARAH KATTAN, BY HER PARENTS AND NEXT FRIENDS,
SUSAN J. THOMAS AND JOSEPH KATTAN, *et al.*,
Respondents.

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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12 pp

TABLE OF CONTENTS

	Page
I. *ELDER* REQUIRES REVERSAL HERE	1
II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW	3
III. THE OTHER ARGUMENTS IN THE OPPOSITION THAT THIS CASE DOES NOT MERIT REVIEW DO NOT WITHSTAND ANALYSIS	4
A. This Court Need Not Decide Whether *Kay v. Ehrler* Bars The *Pro Se* Fee Award Here	4
B. This Case Does Not Present Any Complex Factual Questions	4
C. This Case Does Not Involve Any Discretionary Balancing Of The Equities	6
IV. THE D.C. CIRCUIT'S WAIVER RULE DOES NOT ADVANCE THE FAIR AND EFFICIENT ADMINISTRATION OF JUSTICE	8
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Benavides v. Bureau of Prisons, 993 F.2d 257 (D.C. Cir.), *cert. denied*, 114 S. Ct. 559 (1993) 5

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 3

Cooter & Gell v. Hartmax Corp., 496 U.S. 384 (1990) 6

Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977) 2, 5, 7, 8

Elder v. Holloway, 62 U.S.L.W. 4149 (U.S. Feb. 22, 1994) ..... *passim*

Fogerty v. Fantasy, Inc., 62 U.S.L.W. 4153 (U.S. March 1, 1994) 6

Kay v. Ehrler, 111 S. Ct. 1435 (1991) ..... *passim*

Lawrence v. Staats, 586 F. Supp. 1375 (D.D.C. 1984), *aff'd in part sub nom., Lawrence v. Bowsher*, 931 F.2d 1579 (D.C. Cir. 1991) 8

Morris v. American National Can Corp., 988 F.2d 50 (8th Cir. 1993) 4

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) 4

STATUTES & RULES

42 U.S.C. § 1988 2

Fed. R. Civ. P. 8, 12(g)&(h), and 51 8

Fed. R. Civ. P. 59(e) 2

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I. *ELDER* REQUIRES REVERSAL HERE.

In *Elder v. Holloway*, 62 U.S.L.W. 4149 (U.S. Feb. 22, 1994), this Court ruled that federal courts have an obligation to decide claims properly before them in accordance with the law. Even in the case of a federal appellate court, questions of law "must be resolved *de novo*," and its inquiry into what the law is must "be conducted in light of all relevant precedents, not simply those cited to or discovered by the district court." *Id.* at 4151, 4150.

In so ruling, this Court explained that the contrary rule that had been adopted by the Ninth Circuit did not advance the legitimate and important interests of either plaintiffs or defendants. In cases like *Elder*, involving questions of law, the Ninth's Circuit rule wrongly results in erroneous decisions "because of shortages in counsels' or the court's legal research or briefing." *Id.* at 4151. This Court also observed:

> The Ninth Circuit's rule could have a number of untoward effects. It could occasion appellate affirmation of incorrect legal results . . . and it could place

> defense counsel in a trying situation. See ABA Model Rule of Professional Conduct 3.3(a)(1989 ed.) ("A lawyer shall not knowingly: . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

Id. at 4151 n.3.

Elder requires reversal here. In this case, at the time that the Kattans submitted their fee application in 1988, the parties agreed that *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), governed the claim of an attorney for fees for any *pro se* representation. Three years later, when Judge Green awarded these fees to Mr. Kattan, none of the parties had brought to her attention, and she apparently had not found, this Court's intervening decision in *Kay v. Ehrler*, 111 S. Ct. 1435 (1991), barring fee awards to *pro se* attorneys under 42 U.S.C. § 1988, a federal fee-shifting statute indistinguishable from the basic fee provision here. Because under *Elder*, an appellate court is required to decide a legal claim properly before it *de novo* in light of all relevant precedents, Judge Green was required to decide the validity of Mr. Kattan's claim for attorney's fees for his *pro se* representation in light of the obviously relevant *Kay v. Ehrler*. When she failed to do so, the District acted properly in bringing *Kay v. Ehrler* to her attention in a motion under Fed. R. Civ. P. 59(e), a motion which destroyed the finality of her judgment.

The reasons for the rule set forth in *Elder* apply with equal force here. First, the waiver rule announced by the D.C. Circuit, in which legal rights are settled based on the authority cited by the parties in the district court in the first instance, does not advance the legitimate and important interests of any of the litigants. Second, as even the Opposition appears to concede (Opp. 22 n.23), the D.C. Circuit's waiver rule has resulted in "appellate affirmation of [an] incorrect legal result[] . . .." *Elder*, *supra*, 62 U.S.L.W. at 4151 n.3. Finally, the ethical considerations cited by this Court in *Elder* are

relevant here. Model Rule 3.3(a) would have required counsel for the Kattans to bring *Kay v. Ehrler* to Judge Green's attention had they known of the decision.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW.

The Opposition argues that the District has misstated the issue in this case and that the issue actually presented is of no importance. The Opposition is wrong on both counts.

One way of fairly stating the issue here is whether the lower federal courts must decide claims properly before them "in light of all relevant precedents, not simply those cited to" them. *Elder*, *supra*, 62 U.S.L.W. at 4150. It is the District's position that when Judge Green entered her order awarding fees in 1991, some three years after the fee application had been briefed, she was obligated to decide Mr. Kattan's claim for fees as a *pro se* attorney in light of *Kay v. Ehrler*, an obviously relevant precedent from this Court. The D.C. Circuit, however, rejected this position. As *Elder* demonstrates, whether the D.C. Circuit erred presents an important legal issue.

Another way of fairly stating the issue here is whether a litigant forfeits his right to have his case decided in accordance with a relevant rule of law announced by this Court because a contrary rule of law, which had been adopted as the law of the Circuit, reasonably appeared to govern the case prior to this Court's decision. Once again, given this Court's numerous decisions reversing the law of the Circuits, this issue is an important legal issue.

Review is warranted here not only because this Petition presents an important legal issue but also because the waiver standard adopted by the D.C. Circuit is in conflict with the decisions of this Court and of other Circuits. The Opposition's attempts to distinguish a few of the decisions the District cited in its Petition are patently unsuccessful for several reasons, including the following. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), for example, can-

not be distinguished on the ground that the district court there "in fact passed on the very issue presented" while Judge Green "declined to reach the merits." Opp. 15 & 15 n.19. Here, Judge Green did reach the merits and she wrongly ruled that *Kay v. Ehrler* was not controlling (App. 33a-34a), a ruling that the D.C. Circuit left intact. Furthermore, the Opposition's attempt to distinguish *Morris v. American National Can Corp.*, 988 F.2d 50 (8th Cir. 1993), also fails. No reasonable lawyer or federal court judge could have believed that *Delaware Valley II* (*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)), would be this Court's last pronouncement on the issue of risk enhancement, and the Eighth Circuit excused a waiver of the issue in *Morris* because it had adopted, as the law of the Circuit, Justice O'Connor's opinion in *Delaware Valley II*.

III. THE OTHER ARGUMENTS IN THE OPPOSITION THAT THIS CASE DOES NOT MERIT REVIEW DO NOT WITHSTAND ANALYSIS.

A. This Court Need Not Decide Whether *Kay v. Ehrler* Bars The *Pro Se* Fee Award Here.

The Opposition argues that this Court should deny review because review will require this Court to decide whether *Kay v. Ehrler* bars the *pro se* fee award here. This argument is plainly mistaken. This Court, as it did in *Elder*, can decide only the waiver issue and, should the Court decide that issue in favor of the District, it can remand to the D.C. Circuit with instructions to determine whether *Kay v. Ehrler* is controlling.

B. This Case Does Not Present Any Complex Factual Questions.

The Opposition urges that this Court should deny review because this case, in a number of ways, presents complex factual questions. This argument, in all of its manifestations, is unfounded.

First, given *Elder*, this Court could rule that Judge Green was obligated to decide Mr. Kattan's claim for fees as a

pro se attorney in light of *Kay v. Ehrler* whether or not the District's understanding of *Cuneo* was reasonable. However, should the Court decide that a more stringent waiver standard is needed here, one which, for example, depends on whether an attorney reasonably could have concluded that *Cuneo* was controlling, this Court is free to announce what the standard should be and remand to the D.C. Circuit for further proceedings.

Alternatively, this Court could itself decide whether the District's position was reasonable. On the record here, this issue is an issue of law. Furthermore, the record here makes clear that the District's understanding of *Cuneo* was reasonable. Thus, less than three weeks before the divided decision in this case, the D.C. Circuit in *Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir.), *cert. denied*, 114 S. Ct. 559 (1993), ruled that the only distinction the District could have made between *Cuneo* and this case was "untenable" and thus indefensible. *Id.* at 259. In addition, at the district court level, the Kattans cited only *Cuneo* in support of their argument that the law required an award of attorney's fees to successful *pro se* attorneys. In taking this approach, they obviously expressed their belief that a reasonable reading of *Cuneo* required a fee award to an attorney for any *pro se* representation under the IDEA. They should therefore be estopped from arguing later, for tactical reasons, that the District's agreement with their earlier position was unreasonable. Finally, the Opposition concedes that, following *Kay v. Ehrler*, no reasonable attorney proceeding *pro se*, including Mr. Kattan, would seek fees in a case like this one, even though the D.C. Circuit has not expressly overruled *Cuneo*.[1]

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[1] The Opposition (Opp. 4, 8, 9, 10, 21) also suggests that the District should be faulted because the court in *Cuneo* stated "[t]he law is not clear on the question of whether a party appearing on his own behalf, who is also an attorney, is entitled to tax attorney fees as costs." 553 F.2d at 1366. This suggestion is ridiculous. The court made this statement in surveying the law of other jurisdictions construing a number of fee-shifting statutes; the court then went on to adopt as the law of the D.C. Circuit the rule that such fees are recoverable. After *Cuneo*, therefore, the law of the D.C. Circuit was clear — attorneys proceeding *pro se* under federal fee-shifting statutes may recover fees.

C. This Case Does Not Involve Any Discretionary Balancing Of The Equities.

The Opposition urges that review should be denied because, although the courts below did not say so, what is at issue here is a judgment based on the "facts and circumstances of this case, . . . such as the conduct and attitude of trial counsel" for the District. Opp. 23. See also Opp. 3, 3 n.4, 4, 12, 13. According to the Opposition, the D.C. Circuit found a waiver of the *pro se* fee claim because, *inter alia*, the District "had tenaciously attempted to defend an untenable position" in litigating the merits of the action. Opp. 12.

This argument is utterly mistaken for several reasons.

First, it overlooks the reasons given by the D.C. Circuit for its waiver ruling. The D.C. Circuit ruled that the District could not invoke *Kay v. Ehrler* because it failed to dispute *Cuneo* by pressing a distinction between the FOIA and the IDEA that "would have been far from frivolous." App. 5a. See also App. 7a-8a. That ruling is a pure legal ruling, not a balancing of any equities, and, if wrong, is an abuse of discretion. *See, e.g., Fogerty v. Fantasy*, Inc., 62 U.S.L.W. 4153 (U.S. March 1, 1994) (the standards governing the exercise of discretion in awarding attorney's fees are questions of law); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . ..").

Second, it overlooks the fact that the courts below expressly rejected the arguments the Opposition urges they secretly embraced. Thus, the Kattans' request for sanctions at the trial level was denied (App. 31a), and when they asked for a larger fee award on appeal for trial misconduct, that was also denied. App. 10a. Furthermore, the District persuaded Judge Green that both Mr. Kattan and his co-counsel were requesting hourly rates that were too high. App. 27a-29a. When the Kattans appealed the hourly rate Judge Green had adopted for co-counsel, the D.C. Circuit affirmed

that rate. App. 8a-9a. Finally, despite arguments by the Kattans, neither Judge Green nor the D.C. Circuit faulted the District for its delay in bringing *Kay v. Ehrler* to Judge Green's attention.[2]

In a similar fashion, the Opposition argues that Judge Green may have found a waiver in order to compensate the Kattans for her three-year delay in acting on the fee application, during which time this Court resolved the *pro se* fee issue against them. Opp. 23. This argument, however, far from being a reason for denying review, is a reason for granting review. A federal court cannot refuse to follow the law on the grounds that had it acted more promptly, the other side would have won based on an incorrect legal principle.

Finally, despite the Opposition's recitation that a court may exercise discretion in determining whether a matter has been waived by considering "whether tactical considerations prompted a party's choices, any prejudice to the opposing party, etc.," no such discretion was exercised here. Opp. 22. Had such discretion been exercised, it is plain that neither the District's acceptance of *Cuneo* in 1988 nor its failure to raise *Kay v. Ehrler* before judgment was prompted by any tactical consideration. Furthermore, it is equally plain that the Kattans were not prejudiced by the District's failure to dispute *Cuneo* or by its delay in bringing *Kay v. Ehrler* to Judge Green's attention. In short, there was no exercise of discretion in the traditional sense in this case. Instead, the courts below failed to understand and apply the law governing waiver.

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[2] In view of the facts of *Elder*, where plaintiff's trial counsel overlooked a Circuit precedent that existed even before his suit was filed, the courts below properly refused to fault the District for its six-month delay in bringing *Kay v. Ehrler* to Judge Green's attention, especially since the fee application had been pending before her for over two years when this Court issued *Kay v. Ehrler*.

IV. THE D.C. CIRCUIT'S WAIVER RULE DOES NOT ADVANCE THE FAIR AND EFFICIENT ADMINISTRATION OF JUSTICE.

The Opposition, citing Fed. R. Civ. P. 8, 12(g) & (h), and 51, urges that waiver plays an important role in "judicial administration." Opp. 22. In the District's view, however, and as *Elder* and the cases cited in its Petition make clear, waiver is disfavored in the federal judicial system even though it does have a proper role to play in certain circumstances. Here, of course, the rules cited in the Opposition do not apply to this case. Second, the reasons for these rules and for judge-made rules of waiver do not apply here. A waiver may properly be found when necessary to advance the fair and efficient administration of justice. For example, a waiver may be found to preclude "sandbagging" — a tactic in which a litigant awaits the outcome of a case and, if it is adverse, raises a defense that could, and should, have been raised earlier and that eviscerates all or part of the proceedings that have taken place.

This obviously is not what happened here. The District did not seek, and could not hope to gain, any tactical advantage by its conduct. Furthermore, the Kattans were not prejudiced and the administration of justice was not adversely affected by the District's failure to dispute *Cuneo* or by its delay in invoking *Kay v. Ehrler*.

Finally, whatever contribution the waiver doctrine may make to the fair and efficient administration of justice must, in the context of this case, be weighed against the important contribution that the law of the Circuit makes in achieving that goal. In this case, the District's acceptance of *Cuneo* as controlling in 1988 advanced the fair and efficient administration of justice. The District, by not advancing a distinction that the D.C. Circuit ultimately found untenable when squarely placed before it, avoided launching what surely would have been a losing battle over the validity of the district court's opinion in *Lawrence v. Staats*, 586 F. Supp. 1375 (D.D.C. 1984), in light of the controlling the law of the Circuit in *Cuneo*. And the District likely also avoided

precipitating another collateral battle over sanctions. The Kattans did, in fact, file a motion for sanctions because, in their view, the District "tenaciously attempted to defend an untenable position" on the merits, and there is no reason to believe that they would not have filed another motion for sanctions had the District "tenaciously attempted to defend an untenable position" on the *pro se* fee issue in 1988.

CONCLUSION

This petition presents an issue that recurs with great frequency and that should be resolved by this Court to ensure the fair and efficient administration of justice. At the very least, this Court should order the D.C. Circuit to reconsider its decision in light of *Elder*.

Respectfully submitted,

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